Supreme Court, U. S.
FILED
NOV 1 1980
MICHAEL RODAK, JR., CLERK

No. 80-647

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

**BILL PIERCE, G. FRED SHIRLEY and RANDALL CALLAHAN, suing on behalf of themselves and all participants of the NECA-IBEW WELFARE TRUST FUND WORKING IN JURISDICTION LOCAL IBEW 175,**

*Petitioners,*

vs.

**NECA-IBEW WELFARE TRUST FUND,**

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

The first question presented in the Petition for Writ of Certiorari is stated in a manner which may mislead this Court in two respects. First, it refers to "a retroactive amendment", whereas, the amendment was not applied retroactively. Second, it refers to "vested eligibility", whereas the District Court and the Circuit Court of Appeals ruled that there was no vesting in this case.

The second question presented in the Petition for Writ of Certiorari is basically accurate, but implies a "promise" which was in fact not made.

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**NECA-IBEW WELFARE TRUST FUND,**

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, NECA-IBEW WELFARE TRUST FUND, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Decision of the United States Court of Appeals for the Sixth Circuit.

## STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1051(1)

§*1051. Coverage* Part 2—Participation and Vesting

This part shall apply to any employee benefit plan described in Section 1003(a) of this title (and not exempted under Section 1003(b) of this title) other than—

(1) an employee welfare benefit plan; . . . .

29 U.S.C. §1081(a)(1)

§*1081. Coverage* Part 3—Funding

(a) This part shall apply to any employee pension benefit plan described in Section 1003(a) of this title, (and not exempted under Section 1003(b) of this title), other than—

(1) an employee welfare benefit plan; . . . .

29 U.S.C. §1102(b)(1)

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter; . . . .

29 U.S.C. §1104(a)(1)

§*1104. Fiduciary duties.*

(a)(1) Subject to Sections 1003(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

**Miscellaneous Authorities Cited**

Legislative History of the Employee Retirement Income Security Act of 1974. Prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate (April 1976)

Vol. II, p. 3379—

*Vesting*

Vesting refers to the nonforfeitable right or interest which an employee participant acquires in the pension fund. The benefit credits may vest in an employee immediately, although in most cases participants do not become eligible for vesting of benefits until a stipulated age or period of service, or a combination of both, is attained.

Vol. III, p. 4540—

*Accrued benefit*

Under the conference substitute, the term "accrued benefit" refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan, or to life insurance benefits payable as a lump sum.

## STATEMENT OF THE CASE

Respondent, the NECA-IBEW WELFARE TRUST FUND, is a jointly trusteed employee welfare benefit fund which provides participants and their families with hospital, medical care, death and other benefits. It is managed by a Board of Trustees, half of whom are appointed by labor organizations and half of whom are appointed by management.

The Respondent is a multi-employer and multi-union pooled Trust Fund. From its inception in 1955 it had expanded to the point where it existed for the benefit of more than 17,000 Employees of contributing Employers, represented for the purpose of collective bargaining by over thirty Local Unions. (103a, 135a)[1]

Each of these Local Unions negotiated Collective Bargaining Agreements with Employers under which

[1] Page references are to the pages of the Joint Appendix filed with the Court of Appeals for the Sixth Circuit.

contributions would be made to the Trustees of the NECA-IBEW WELFARE TRUST FUND.

The Trustees receive these monies and use them to pay claims. The Trust Fund is self-insured for all health and welfare benefits.

The Respondent Trust Fund is governed by an Agreement and Declaration of Trust under which the Trustees are empowered and required to promulgate eligibility rules. (135a)

The Trustees must establish benefit levels for different types of medical procedures. They must also establish eligibility rules to determine which persons are able to receive these benefits.

The Trustees must insure that the Trust Fund remains solvent. To control costs they may do one of two things. They may increase or decrease the benefit levels and/or they may liberalize or tighten the eligibility rules.

In the event that a Local Union were to withdraw from participation, no further monies would be forthcoming from the Employers working in that Local Union's jurisdiction.

Until 1975, no Local Union had ever sought to withdraw from participation in the Trust Fund. On June 1, 1975 Local No. 176, IBEW, of Joliet, Illinois withdrew from participation in the Trust Fund. Under the then current eligibility rules, claims incurred after the date of the withdrawal were paid by the Trustees, even though there were no longer any contributions coming into the Trust Fund from that area. The payment of these claims cost the Trust Fund approximately $700,000. (139a, 140a)

The eligibility rules are designed to permit participants to continue to be eligible for benefits even during periods of less than full employment. This is done by granting benefits to a person who meets any of the hourly tests, e.g., having worked 250 hours in the next preceding eligibility quarter, 500 hours in the two preceding quarters, 750 hours in the three preceding quarters or 1,000 hours in the preceding year. (158a)

With the experience of the Joliet withdrawal it became apparent that these same rules, unless modified, could result, and indeed, did result in a large group of people continuing to be eligible for benefits, not just during a period of temporary unemployment, but while they were still working and having contributions made to another Trust Fund.

The Consultant to the Trust Fund became concerned and investigated this situation to see if anything could be done to prevent such a large loss from happening again in the event any of the other Local Unions were to decide to withdraw. (140a)

An amendment to the eligibility rules was proposed to deal with the situation where a Local Union would voluntarily cease participation in the Trust Fund. The Fund Consultant, Accountant and Attorney joined in recommending its adoption. (140a, 141a) Identical amendments to the Trust Agreement and to the Plan of Benefits were adopted on January 15, 1976 by a unanimous vote of the Board of Trustees at a meeting at which representatives from the jurisdiction of Local 175, the Petitioners' Local Union, were present. The amendment provides:

> "In the event that a Collective Bargaining Agreement requiring contributions to the Welfare Fund is not succeeded by a Collective Bargaining Agree-

> ment requiring contributions to the Welfare Fund, then a participating Employer which is no longer obligated under the terms of a Collective Bargaining Agreement to make contributions to the Welfare Fund shall cease being a participating Employer on the date that the obligation terminates, and its Employees shall not be Eligible Employees as to any claims incurred on or after the thirty-first calendar day following the date on which the obligation to contribute terminated." (138a)

The Trustees could have decided to retain the prior eligibility rules. Had they done so, additional monies would have had to be negotiated in each of the Collective Bargaining Agreements of all of the Unions involved. (144a) It was estimated by the Consultant that to establish a reserve for full funding of this contingent liability would require an additional eleven million dollars in contributions by 1980. (156a) Either the contribution rate would have had to be raised substantially to support this or a reduction would have had to be made in the amount of benefits payable under the Plan. (144a) The District Court found and the Court of Appeals agreed that the balancing of such considerations was within the reasonable discretion of the Trustees. (144a, 145a)

After the rule was adopted it was made part of a booklet which was distributed to the Plan participants.

It is important to realize that at the time the rule was adopted, neither the Petitioners' Local Union nor any other Union had announced any intention or desire to withdraw from participation. (143a) The rule was designed to apply even-handedly to all of the participants in the Plan. (95a)

On January 1, 1977, almost one year after the eligibility rule was adopted, Local Union 175, IBEW, Petitioners' Local Union, voluntarily withdrew from participation in the Trust Fund and began making contributions to another Welfare Trust Fund. (137a)

In accordance with the eligibility rules of the Trust Fund no benefits were paid to the participants who withdrew for claims incurred after the 31 day period had expired. (137a) Claims incurred prior to that date, of course, were paid even though the payment date was after the expiration of the 31 day period. (139a)

The challenged eligibility rule has been in effect since January 15, 1976, the date of its adoption. Its legality was challenged by the Petitioners.

The District Court ruled and the Court of Appeals agreed that the Petitioners had "failed to establish that the conduct of the Trustees . . . was in violation of either LMRA or ERISA".

## SUMMARY OF ARGUMENT

The Court of Appeals correctly decided that the adoption of the eligibility rule challenged by the Petitioners was not arbitrary or capricious. There is no Court of Appeals case in conflict with that decision. The Court of Appeals for the Sixth Circuit followed an unbroken line of authority establishing the standard by which the actions of Trustees are to be judged.

The "arbitrary and capricious" standard has been developed over a long period of time and has been adopted by every Circuit Court of Appeals that has dealt with reviewing the propriety of eligibility rules adopted by Boards of Trustees.

In addition, the facts of the case clearly show that the amendment made by the Trustees was adopted to protect the Trust Fund and to protect the interest of all of the participants and beneficiaries. These facts were fully considered and the case was correctly decided by the District Court and the Court of Appeals. In view of the unanimity among the Courts of Appeals that have addressed issues such as the ones dealt with in this cause and the stability of the rule of law in this area, it is unlikely that this Court would need to reach either of the questions presented by the Petitioners. It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

## REASONS WHY THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED

### I.

### THE DECISION BELOW IS NOT IN CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER FEDERAL COURTS.

The decision below is not in conflict with the decisions of other Federal Courts. To the contrary, the standard used by the Sixth Circuit below is one which has been developed over a number of years and recognized by every Court of Appeals that has decided similar cases. The principle is that Trustees have wide discretion and that the Federal Courts will not interfere unless the Trustees' actions have been arbitrary and capricious. This principle has been adopted by the Circuit Court of Appeals for the First Circuit in *Rueda v. Seafarers International Union, et al.*, 576 F.2d 939 (1978); the Second Circuit in *Riley v. MEBA Pension Trust*, 570 F.2d 406 (1977); the Third Circuit in *Gomez v. Lewis*, 414 F.2d 1312 (1969); the Fifth Circuit in *Bayles v. Central States Southeast and Southwest Areas Pension Fund*, 602 F.2d 97 (1979); the Sixth Circuit in *Local Union No. 5 et al. v. Mahoning and Trumbull County Building Trades Welfare Fund, et al.*, 541 F.2d 636 (1976); the Seventh Circuit in *Johnson v. Botica*, 537 F.2d 930 (1976); the Eighth Circuit in *Bueneman v. Central States Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208 (1978); the Ninth Circuit in *Tomlin v. Board of Trustees, et al.*, 586 F.2d 148 (1978); the Tenth Circuit in *Mestas v. Huge, et al.*, 585 F.2d 450 (1978); and the D.C. Circuit in *Roark v. Lewis*, 401 F.2d 425 (1968) and *Miniard v. Lewis*, 387 F.2d 864 (1967).

For the proposition that there is a conflict, Petitioners cite *Yellow Freight Systems, Inc. v. I.A.M. National Pension Fund*, 553 F.2d 352 (D.C. Cir. 1977) and *McCoy v. Mesta Machine Co.*, (Civ. No. 77-1046, W.D. Pa. October 23, 1978). Both cases are clearly distinguishable from this cause.

In *Yellow Freight Systems, Inc.* a participant was denied pension benefits. The Court found that the denial of his pension was arbitrary and capricious. In that case the participant's rights had vested and he was entitled to retire on an early retirement pension at any time during the six years before the eligibility rules were changed. He continued working and was not aware of the change in the rules. When he retired his application for pension benefits was denied. The Court points out that the participant could have "elected to retire" and should have been given notice of his ability to do so.

That decision is a correct one, but there is no conflict between the decision in *Yellow Freight Systems, Inc.* and the instant case. Nor is *McCoy v. Mesta Machine Co.* in conflict. In that case, also, the rights under the pension plan had vested and notice had not been given in a timely manner. Petitioners and the other participants were notified of the change in the rules, and no vested rights were affected.

Notice was given of the amendment in this case. The rule was adopted on January 15, 1976 at a meeting at which both the Employer Trustee and the Union Trustee from the Petitioners' wage area were present. Written notice of the rule change was given to the participants in the form of a Plan Booklet distributed several months before Petitioners' Local Union voluntarily withdrew from participation on December 31, 1977, almost one year after the rule was adopted.

Petitioners allege, on page 11 of their Brief, that the Sixth Circuit decided that "accrued rights or vested rights could be eliminated by an amendment which would be retroactive in nature". That statement is not accurate and as a result may mislead this Court as to the issues in this case.

There is no "vesting" in welfare benefit plans such as the Plan operated by the Trustees. Nor were the Petitioners deprived of "accrued rights or vested rights".

The phrase "accrued rights" was discussed on August 12, 1974 in House Report 93-1280 to H.R. 2, which became law as ERISA, as follows:

> Under the conference substitute the term "accrued benefit" refers to pension or retirement benefits. The term does not apply to . . . payments of medical expenses . . . Legislative History of the Employee Retirement Income Security Act, 1974 (April 1976) Vol. III, p. 4540.

The term "vesting" was discussed on February 26, 1974 as part of the floor debate on H.R. 2, as follows:

> Vesting refers to the nonforfeitable right or interest which an employee participant acquires in the *pension fund.* (emphasis added). *Id.* Vol. II at 3379.

The rule was not applied until almost a year after it was adopted. It had no "retroactive" effect. Any inference that the Trustees applied the rule in a retroactive manner to the Petitioners is untrue. Any assertion that the Sixth Circuit condoned such an application is also untrue.

Eligibility rules can be changed. A claim is paid, subject to the limitations as to amounts in the Plan of Benefits, only if that claim is incurred by a participant who, at that time is eligible for benefits.

As Judge Wilson pointed out in the District Court opinion in this litigation; "it cannot be said that the benefits became 'vested' in the true sense of that term until a claim arose that was payable under the then current provisions of the Plan".

The United States Court of Appeals for the Ninth Circuit recently decided a case in which certain participants challenged an amendment to a welfare plan which reduced the benefits they would have received had the rules not been amended. The Court dealt with the "vesting" argument, stating that:

> . . . [t]he health and welfare benefits were not vested property rights but were instead contractual rights subject to amendment by the parties to the agreement. *Turner v. Local Union No. 302*, 604 F.2d 1219, 1226 (9th Cir. 1979).

Central to Petitioners' argument is that the individual employees in some way have individual vested rights to the employer contributions made to the Welfare Fund. They do not. The rights they have are collective rights which are contingent upon meeting the requirements of the eligibility rules established by the Trustees and in effect at the time they incur a claim for medical expenses. With respect to fringe benefit contributions to a multi-employer pension fund, this Court noted that the "employees paid nothing to the Plan themselves." *Teamsters v. Daniels*, 439 U.S. 551, 553 (1979). This Court further noted that it is "inaccurate to describe these payments as having been 'on behalf' of any employee". *Id.* at 560. This is in accord with the decision in *Walsh v. Schlecht*, 429 U.S. 401 (1977).

The Trustees' position that there is no concept of "vesting" in the case of employee welfare benefit plans is supported by ERISA, which states that the Vesting Part

of the Act does not apply to employee welfare benefit plans. (29 U.S.C. 1051(1)). Petitioners have cited no decision that would support the opposite conclusion and have not shown a conflict in principle between the decision below and the decisions of other Federal Courts.

## II.

## THE DECISION BELOW WAS FULLY CONSIDERED, AND CORRECTLY DECIDED IN ACCORDANCE WITH FEDERAL LAW.

Petitioner correctly asserts that 29 U.S.C. 1102(b)(1) requires that every Trust Fund establish a funding policy. That is true. The Trustees did establish a funding policy. As part of that policy the Trustees decided not to establish a reserve for the instance where one of the participating Local Unions were to voluntarily decide to withdraw from participation in the Plan.

However, nowhere in the statute is there a requirement that employee welfare benefit funds meet any particular standards regarding "funding". 29 U.S.C. 1081(a) specifically provides that the funding standards of ERISA do not apply to employee welfare benefit plans.

The issue of funding was discussed as part of the floor debate in the House of Representatives as follows:

> Funding refers to the accumulation of sufficient assets in a *pension plan* . . . (emphasis added). Legislative History, *Ibid.*, Vol. II at p. 3379.

It should be noted that not only did the Trust Fund Consultant testify that there is no required standard for the funding of welfare plans (91a), so did the Consultant called as a witness on behalf of the Petitioners, as shown by the following question and answer from the hearing transcript:

Q. (Mr. McCarthy) Is there any standard of which you are aware which requires a certain level of funding for employee welfare benefit fund?
A. (Mr. Brassell) No, there is none. (128a)

It is also interesting to note that Mr. Brassell, the Petitioners' Consultant, has recommended that the welfare trust fund in which Petitioners are now participating adopt a substantially identical rule to the one challenged here. (67a, 68a) Mr. Brassell testified that he recommended the adoption of that rule in order to "protect the financial soundness of the Plan". (67a)

Among the factors considered by the Trustees in adopting the amendment was a balancing of the cost of establishing such a reserve and the benefit to the participants in doing so.

To have established such a reserve would have increased the Employer's labor cost by an estimated 11 million dollars in the four years since the challenged rule was adopted. During this period of time, the employees participating in the Trust Fund would have received no increase in benefits.

The Trustees decided not to place such a large burden on the industry merely to provide funds for an event that may not have occurred again or which may occur only infrequently. It had happened once and the cost was high. The Trustees had to take action to protect the assets of the Trust Fund. Rather than establish a large special reserve, they decided to adopt a limitation on the trust's liability.

The Trustees could have adopted a different rule and a different funding policy. However, as was observed by the Ninth Circuit, "We must be ever mindful that it is for the Trustees, not the Courts, to choose between two reasonable alternatives." *Tomlin v. Board of Trustees of*

*the Construction Laborers Pension Trust for Southern California*, 586 F.2d 148, 151 (9th Cir. 1978). See also, *Rehmar v. Smith*, 555 F.2d 1362 (9th Cir. 1976).

It is recognized by the Courts that ". . . the law does not require the best possible eligibility requirements but only that those requirements have a rational justification." *Riley v. MEBA Pension Trust*, 570 F.2d 406, 412 (2nd Cir. 1977).

The Trustee believed that the amendment was necessary to protect the interests of all of the participants. In so acting, the Trustees were acting in a proper manner, as pointed out in a recent Court of Appeals case a Court:

> . . . need not be convinced that the Trustees' approach is the only or the best way to plan and maintain the integrity of the Fund. [A Court] . . . need only be convinced that it is a rational one . . . *Rueda v. Seafarers International Union et al.*, 576 F.2d 939, 942-943 (8th Cir. 1978).

The decision below is in accord with well established federal law and there is no compelling need for this Court to grant the Petition for Writ of Certiorari.

## CONCLUSION

Because there has been no misapplication of law, no conflict among the Circuits, and for the other reasons stated in this Brief it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October, 1980, I mailed by regular U.S. Mail, postage prepaid, three copies of the foregoing Brief of the Respondent to Mr. S. Del Fuston, 609 Maclellan Building, Chattanooga, Tennessee 37402, (615) 266-6423, Attorney for Petitioners.

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Subscribed and sworn to before me this 31st day of October, 1980.

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